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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* CITY OF LOS ANGELES, AND THE CITIES OF BERKELEY, CAPITOLA, CARLSBAD, CHULA VISTA, HAWTHORNE, HAYWARD, HOLLISTER, INGLEWOOD, LAKEWOOD, LOS GATOS, MARTINEZ, MONTEREY, MOUNTAIN VIEW, OCEANSIDE, PALM DESERT, PALO ALTO, PLEASANT HILL, PLEASANTON, SACRAMENTO, SAN DIEGO, SAN FRANCISCO, SAN LUIS OBISPO, SAN MARCOS, SANTA CLARA, SANTA CRUZ, SARATOGA, TIBURON, TOWN OF DANVILLE, VICTORVILLE, THE COUNTY OF SAN FRANCISCO, AND THE LOS ANGELES COUNTY TOBACCO CONTROL ALLIANCE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus City of Los Angeles (the "City") adopted an ordinance in 1998 similar to that at issue in this case. That ordinance was based on detailed studies and factfinding by the City's Planning Department, extensive hearings before the City Council and City Planning Commission, and legal analysis by the City Attorney. The investigation confirmed the severity of underage smoking and a strong link to outdoor and storefront tobacco advertising.

The remaining *amici* are 30 local governments in California and one non-profit organization that share similar concerns, and have either passed similar ordinances, or wish to preserve the police power of local governments to take such action in the future. The local governments, their ordinances, and the organization are further described in Appendix A to this brief.

BACKGROUND

In April 1997, the City of Los Angeles began an extensive inquiry into ways to reduce underage smoking and drinking. The investigation lasted sixteen months, involved many public hearings, review of scores of studies and reports, and detailed analyses of the location and impact of billboards and signs advertising tobacco and alcohol products in Los Angeles. The resulting legislative record, summarized here,[2] demonstrated a powerful link between tobacco and alcohol

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[1] Pursuant to Rules 37.4 and 37.6 of this Court, each local goverment *amicus* states that submission of the brief is authorized by its authorized law officer, and all *amici* state that no party had any role in writing this brief, and that no party other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

[2] All citations in the Background are to materials in the Los Angeles legislative record, portions of which have been lodged with the Clerk.

advertising and underage smoking and drinking. To protect the welfare of minors and help enforce the ban on sales to minors, the City exercised its police powers to adopt an ordinance restricting such advertising in areas frequented by minors. See App. B.

A. Underage Smoking And Advertising

The record before the City showed that, despite California's century-old prohibition on sales of tobacco products to minors,[3] each year 75,000 underage Californians smoke their first cigarette; in Los Angeles County alone, 100 minors begin smoking each day.[4] Minors who try cigarettes first do so, on average, before they turn 15, and those who become daily smokers do so, on average, before they turn 18;[5] they also are far more likely to "move on to other drugs."[6]

The record also showed that tobacco use by California adolescents increased 31% between 1993 and 1995. *CPC Staff Report*, *supra* note 4, at 34. Nationwide, teen use soared

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[3] Cal. Penal Code § 308 (enacted 1891). Under § 308, it is unlawful to sell or furnish tobacco products to any person under the age of 18 years old; as amended in 1996, § 308 also makes it illegal for those under 18 to obtain, possess or control any tobacco product. *Id.*

[4] Los Angeles City Planning Dep't, CPC No. 97-0242 CA, CF No. 96-1632-S1, *Staff Report to the City Planning Commission, Re: Proposed Ordinances to Restrict the Advertisement of Tobacco and/or Alcoholic Beverages on Publicly Visible Signs Citywide or within 1,000 Feet of Certain Properties Frequented by Minors* 33 (Apr. 9, 1998) (hereinafter "*CPC Staff Report*") (citing California Healthy Cities Project Connections (1995)).

[5] U.S. Surgeon General, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 65 (1994) (hereinafter "*1994 Surgeon General Report*"), *cited generally in CPC Staff Report*, *supra* note 4, at 32.

[6] *CPC Staff Report*, *supra* note 4, at 33 (citing Columbia Univ. Ctr. on Addiction & Substance Abuse, *Comprehensive National Analysis Between Gateway Drug Use and Other Illicit Drug Use* (Oct. 29, 1994); *see id.* ("Youth who smoked tobacco were 19 times more likely to use cocaine.").

by one-third between 1991 and 1996, from 27.5% to 34.8%.[7] Most new smokers were teens: "Of the thousands of people who start smoking daily, 90 percent are under the age of 21; 60 percent are not even 16." *CPC Staff Report, supra* note 4 at 31.

National reports conclude that advertising contributes to underage smoking. *Id.* at 30-32. For example, studies of smoking initiation rates demonstrate that sharp increases in underage smoking have coincided with particularly effective tobacco advertising campaigns; indeed, a California study attributed 34% of all adolescent tobacco experimentation to advertising and promotional activities.[8] That study also found that "each year an additional 6,000 underage adolescents in Los Angeles County purchased cigarettes for the first time illegally because of the influence of tobacco advertising and promotional activities."[9] The study concluded that the influence of tobacco advertising "is much stronger than the influence of either peer smoking or family smoking. This association is more than a coincidence, and it meets all the criteria for attributing causality."[10]

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[7] Los Angeles City Planning Dep't, CF No. 96-1632-S1, *Revised Findings For Tobacco Advertising Ordinance as Amended and Adopted By Los Angeles City Council* 7 & n.34 (Sept. 9, 1998) (hereinafter "*Revised Findings*") (citing Centers For Disease Control figures reported in Mike Clary, *Teen-Driven Ad Campaign Puts Heat on Big Tobacco*, L.A. Times, May 8, 1998, at A1, A24-A25).

[8] *Revised Findings, supra* note 7, at 5-6, 13 (citing Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998)) (hereinafter "*Dr. Pierce Study*").

[9] *Hearing on Proposed Ordinance to Amend Chapter IV of the Los Angeles Municipal Code before the Los Angeles Planning and Land Use and Arts, Health and Humanities Joint Comm. Meeting* 24-27 (June 9, 1998) (Testimony of John Pierce, Ph.D., Professor of Cancer Prevention, Univ. of San Diego; former Chief Epidemiologist, Office on Smoking and Health, Surgeon General C. Everett Koop).

[10] *Id. See generally Dr. Pierce Study, supra* note 8.

Attracting minors is important to the tobacco industry. Minors are "the tobacco industry's primary source of new customers in this country, replacing adults who have either quit or died."[11] Internal industry documents reveal the importance of advertising in attracting new customers.[12] *Revised Findings*, *supra* note 7, at 6. A former tobacco company executive stated because "the fragile, developing self-image of the young person needs all the support and enhancement it can get . . . self-image enhancement has traditionally been a strong promotional theme for cigarette brands and should continue to be emphasized." *Id.* at 6-7. An internal document acquired from another company states: "'If the last ten years have taught us anything, it is that the industry is dominated by companies who respond most effectively to the needs of younger smokers.'"[13]

Studies also showed that restricting tobacco advertising decreases underage smoking. A New Zealand study found that greater governmental control over tobacco promotion

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[11] Roesler, *Operation Storefront: Youth Against Tobacco Advertising and Promotion* (1995) (hereinafter "*Operation Storefront*") (quoting David A. Kessler, former commissioner of the FDA), *cited in Revised Findings*, supra note 7, at 16 n.81.

[12] Because "[t]eens actively search for cues from their peers and from advertising for the 'right' way to look and behave . . . ," adolescents are particularly susceptible to cigarette advertising. John Giglio, MA, JD, *How Tobacco Company Advertising Influences Minors to Use Tobacco: A Summary of Independent Research and Internal Industry Documents*, Am. Cancer Soc'y, May 20, 1996, at 7, *cited in Revised Findings*, *supra* note 7, at 7 & n.30. The tobacco ads portray tobacco use as "desirable, socially approved, safe and healthful, and widely practiced behavior among young adults," *id.*, leading teens to believe "smoking may enhance [their] self-image," *Revised Findings*, *supra* note 7, at 6.

[13] FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 60 Fed. Reg. 41313, 41331 (Aug. 11, 1995) (to be codified at 21 CFR Pts. 801, 803, 804, and 897) (hereinafter "*FDA Proposed Rule*"), *cited generally with approval in Revised Findings*, *supra* note 7.

increases the annual average decline in tobacco consumption and the rate of decline in underage smoking. A British study also found that restrictions on advertising tend to decrease tobacco use beyond what would have occurred in the absence of such restrictions. An in-depth analysis found that advertising restrictions in four western European countries also led to a reduction in tobacco consumption. Thus, in countries where advertising is banned or severely restricted, the percentage of minors who smoke has decreased more rapidly than in countries where promotion is less restricted.[14]

B. Billboards And Signs Posted Near Minors

Outdoor tobacco advertising is pervasive and unavoidable. It is "seen by everyone that goes out of the house to work, shop, or play. . . It can't be shut off, tuned out, thrown in the trash . . . . [It] offers constant reinforcement of the advertising message with a bombardment of imagery."[15] Children, particularly those in minority communities, are inundated with outdoor tobacco advertising on their way to school, in their neighborhoods, and in parks, and parents cannot limit exposure to these advertisements. *Revised Findings*, *supra* note 7, at 5, 16 n.80.

Local reports also showed that billboards and storefront signs were often located near schools and paths to schools. One report showed that 80.3% of billboards in three large neighborhoods were within five blocks of a school. *Id.* at 3. A second showed that signs in stores within two blocks of schools in another area were located at children's eye-level. *Id.* A third echoed these findings and attached photographs of storefront windows, including one in front of an elementary

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[14] The findings of the New Zealand, Great Britain, and Western European studies are set forth in Giglio, *supra* note 12, at 17-18, *cited in Revised Findings*, *supra* note 7, at 7 n.30.

[15] Marketing Ad Ventures, *Why Advertise Outdoor?*, *at* http://www.adsoutdoor.com/outdoor.html (last visited Mar. 9, 1998), *cited in Revised Findings*, *supra* note 7, at 3 & n.6.

school that advertised "School Supplies" in the middle of a large sign advertising Marlboro cigarettes. *Id.* & n.9.

The placement of such advertising does not appear to be coincidental. California reports showed that stores within 1000 feet of schools displayed a higher number of cigarette ads and promotions that were visible from the outside than stores beyond this radius. Half of the ads were displayed at a height of no more than three feet. And half of the stores near schools placed tobacco ads next to candy displays.[16]

The City Planning Department prepared detailed maps and analyses pinpointing the location of billboards to assess the relative effect of restrictions on tobacco billboard advertising at various distances (ranging from 500 to 2000 feet) from the areas where minors spend most of their time. The study concluded that barring tobacco advertising within 1000 feet of these areas was both necessary and sufficient to insulate minors. Such a limit did not include roughly 8,100 acres, or 37%, of industrial planned use areas and 23% of current industrial use areas.[17] It was also consistent with federal law (*e.g.*, 21 U.S.C. § 860, which penalizes drug activity within 1000 feet of schools); state law (*e.g.*, California, which bans tobacco billboards within 1000 feet of schools); and FDA findings (that standard billboard lettering (12-24 inches in height) can be read at distances of 1000 feet). *Revised Findings*, *supra* note 7, at 16.

C. The Los Angeles Ordinance

Ultimately, the City concluded—like Massachusetts and dozens of other communities in California and across the

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[16] The California reports and findings stated above are set forth in *Operation Storefront*, *supra* note 11.

[17] *CPC Staff Report*, *supra* note 4, at 22-23; *see also* Los Angeles City Planning Dep't, CPC No. 97-0242 CA, CF No. 96-1632-S1, *Billboards Interim Report: A Citywide Study of Off-Site Signs* 5-12 (Jan. 21, 1998); *Revised Findings*, *supra* note 7, at 21.

country—that a regulation designed to sever the link between publicly visible tobacco advertising and underage smoking was needed to deter minors from illegally purchasing and using tobacco. In 1998, the City enacted an ordinance "to promote the welfare and temperance of minors by reducing their exposure to certain publicly visible advertisements of . . . tobacco products in areas where children and youth are known to frequent." *CPC Staff Report*, supra note 4, at 3. The ordinance prohibits: (1) advertising, including off-site signs or billboards, in "publicly visible locations within 1000 feet of any residential zone, residential use, school, religious institution, entertainment park, youth center, or public park or playground"; and (2) on-site signs "placed within three feet of any window or door in such a manner that it is visible from outside the building" (hereinafter the "Los Angeles Ordinance").[18]

The Los Angeles Ordinance reflects the City's conclusion that attacking demand would be an effective complement to other efforts to enforce the ban on sales to minors. Despite efforts to improve enforcement of the ban, such as federal regulations adopted in 1996, studies showed that 70% of minors who tried to buy tobacco were able to do so. Even in towns that performed tobacco stings, 58% of minors were able to buy tobacco. And in three Massachusetts towns where enforcement made illegal sales less frequent, tobacco use among high school students increased.[19]

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[18] Los Angeles, California, Ordinance 172212 (1998), reproduced in Appendix B hereto. The distance specified is the horizontal measure in a straight line from the property line of one of the above-discussed areas. *Id.* The Los Angeles Ordinance predates the Master Settlement Agreement, covers signs excluded by the MSA (*e.g*, those smaller than 14 square feet or large signs sponsoring an event and placed outside the event site), and contains a number of limitations. *Id.*

[19] *See* B.J. Feder, *Youth-Smoking Study Sees Little Effect in Sting Efforts*, N.Y. Times, Oct. 9, 1997, at A5, *cited in Revised Findings*, *supra* note 7, at 7 n.32 .

The tobacco companies' voluntary educational programs for merchants and their customers have likewise failed to reduce underage smoking. Despite these programs, in over thirteen studies of over-the-counter sales, approximately 67% of minors were able to purchase cigarettes illegally. Other attempts to reduce sales of tobacco to minors through educational programs for retailers have not been very effective.[20] One study found that minors were able to buy cigarettes in 73% of stores receiving informational packages on preventing illegal sales to minors.[21]

Finally, the ordinance leaves open ample alternative means of advertising tobacco to adult consumers who may lawfully purchase such products. The Federal Trade Commission reported that the tobacco industry spent over $5 billion on advertising and promotional expenditures in 1996, with only 5.7% of this money devoted to outdoor billboard advertising.[22] Thus, the ordinance "provides multiple and adequate opportunities for . . . [tobacco] advertising, while still promoting the welfare and temperance of minors." *Revised Findings*, *supra* note 7, at 22.

SUMMARY OF ARGUMENT

Cities of all sizes throughout California confront a common and urgent problem: the demand for and use of tobacco products by minors. This demand is fueled in significant part by pervasive tobacco advertising that parents cannot screen

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[20] Giglio, *supra* note 12, at 16-17, *cited in Revised Findings*, *supra* note 7, at 7; *see also FDA Proposed Rule*, 60 Fed. Reg. at 41322 & n.5 (citing *1994 Surgeon General Report*, at 249).

[21] *FDA Proposed Rule*, 60 Fed. Reg. at 41322 & n.9 (citing Feighery et al., *The Effects of Combining Education and Enforcement to Reduce Tobacco Sales to Minors*, 266 JAMA 3168-71 (1991)).

[22] Federal Trade Comm'n, *Report to Congress for 1996* (issued in 1998), *cited in Revised Findings*, *supra* note 7, at 6.

and minors cannot avoid. Neither federal law nor the First Amendment prevents cities from addressing this problem.

Congress did not preempt the police power of States and localities to adopt measures in aid of long-standing bans on sales to minors. The language, purpose, and history of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (the "Act"), show that Congress left untouched the States' historic police powers to discourage tobacco sales to minors and control the location of advertising. This Court has already rejected the sweeping statutory construction urged by petitioners, which overlooks both the ambiguity in the language defining the Act's reach, as well as the traditionally narrow scope of preemption of state police powers. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) (plurality).

Nor do restrictions on tobacco advertising such as those Massachusetts has adopted violate the First Amendment. These regulations apply to unavoidable advertising of a product that is illegal to sell to minors in all 50 States, yet they leave open numerous alternative means of advertising this product to adults–including those promotional vehicles that receive the lion's share of advertising dollars. As a result, the regulations do not raise the concerns about "offensive paternalism" or "complete bans" on truthful commercial speech concerning "lawful" products that have led members of this Court to question whether strict judicial scrutiny of commercial speech restrictions is warranted. Rather, these regulations directly further the States' police power to ban certain sales and to regulate the integrity and fairness of commercial activity, while leaving advertisers ample access to adult consumers.

ARGUMENT

I. THE REGULATIONS ARE NOT PREEMPTED.

Petitioners and their *amici* argue that the preemption inquiry here is governed solely by the "plain language" rule.

They contend that § 5(b) has a plain meaning that necessarily preempts the Massachusetts regulations. Pet. Br. at 14-16, 18; PLAC Br. at 3-8; Washington Legal Foundation Br. at 10-17. They roundly criticize the appellate courts that have concluded otherwise for looking to the statutory framework, purpose, and history. *Id.*

Petitioners are wrong for two reasons. First, the language of § 5(b) is ambiguous in several respects; accordingly, the purpose and history of the Act must be examined to resolve these ambiguities. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417-19 (1998). Second, a "clear and manifest" statement of Congressional intent is required to preempt the States and Localities from exercising their traditional police powers. In construing § 5(b) in *Cipollone*, this Court considered the very materials that petitioners now claim the appellate courts were forbidden to examine. Those materials led this Court to conclude that § 5(b) was intended to preserve, not preempt, the States' authority to exercise their traditional police powers. And that determination compels the conclusion here that States and Localities may exercise their police powers to regulate the location of advertisements that urge minors to purchase cigarettes in violation of State law.

A. Section 5(b) Is Ambiguous.

Petitioners claim that because the words "with respect to . . . advertising" are unambiguous, the Massachusetts regulations, which pertain to "advertising," are preempted. Petitioners cast their gaze too narrowly. Section 5(b) preempts any "requirement or prohibition based on smoking and health . . . imposed under State law . . . with respect to . . . advertising or promotion." "[E]ach phrase within that clause limits the universe of [State measures] pre-empted by the statute." *Cipollone*, 505 U.S. at 524. Determining the pre-emptive scope of § 5(b) thus requires consideration of the terms "requirement or prohibition" and "based on smoking and health."

Petitioners construe the terms "[n]o requirement or prohibition" in § 5(b) in isolation, and assert that they cover all requirements or prohibitions pertaining to advertising. But the plain meaning of a statute must be derived by examining the statute as a whole, and "a word 'gathers meaning from the words around it.'" *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 702 (1995) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see also *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 576 (1995). Here, § 5(a) uses the verb form of "requirement" twice: it provides that "[n]o statement relating to smoking and health, other than the statement *required* by section 1333 of this title, shall be *required* on any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). Thus, § 5(a) bars only those "requirements" that regulate advertising content—*i.e.*, required statements on packaging that relate to smoking and health. See Pet. Br. at 19 (conceding that "subsection (a) . . . uses language referring explicitly to content, limiting its preemption to laws or regulations that require 'statements on packages.'"). Because the word "requirement" in § 5(b) is properly understood to draw meaning from Congress' use of the root-verb "require" in § 5(a), it is reasonably read to preempt only those "requirements" that regulate the content of tobacco advertising. See *Gustafson*, 513 U.S. at 575-76. It follows logically that the term "prohibition" is similarly limited.[23] This reasonable reading of § 5(b) alone justifies an examination of the Act's history and purpose to determine whether Congress intended to preempt only those measures that regulate the content of tobacco advertising, rather than all advertising-related requirements.

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[23] This reading gives effect to the 1969 amendments, which broadened the reach of § 5(b). The original version barred only regulations that mandated certain content in advertising; the amended version prohibits all regulations of content, including, for example, those that would prohibit use of cartoons.

Similarly, the term "based on smoking and health" also lacks a single plain meaning. The ambiguity lies in the extent to which, to be preempted, a statute must be "based on smoking and health." Must a statute be based *exclusively* on a concern for "smoking and health"? Or is it enough that it be based *principally*, or even *slightly*, on such a concern? And what about a statute originally enacted for non-health purposes that could now be said, given current scientific concerns, to be supported by a health rationale? The seriousness of this ambiguity is demonstrated by the three separate opinions in *Cipollone*, each defining "'based on smoking and health'" at a different "level of generality." See 505 U.S. at 529 n.27 (plurality opinion, discussing differences). This ambiguity on the face of § 5(b) also requires resort to the very constructive aids to which petitioners object.

B. "Clear and Manifest" Congressional Intent Is Required To Preempt Cities From Exercising Their Traditional Police Powers.

Petitioners also overlook a second important consideration. The consideration of preemption issues "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action . . . particularly in . . . 'a field which the States have traditionally occupied'" reflects the fact that "the States are independent sovereigns in our federal system." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996).

A majority of this Court applied these principles in *Cipollone*, 505 U.S. at 516, the only prior case in which this Court considered the meaning of § 5(b). Seven members of the Court agreed that "the presumption against the preemption of state police power regulations . . . reinforces the appropriateness of a narrow reading of § 5." *Id.* at 518. Thus, the *Cipollone* plurality considered the statutory text,

framework, purposes, and legislative history, and concluded that § 5(b) does not preempt state fraud and conspiracy claims that might be said to be "'based on smoking and health.'" *Id.* at 529. Even though the thrust of these claims was that the tobacco companies had lied about the health consequences of smoking, the plurality reasoned that the claims were based upon an obligation—the "duty not to deceive"—that was "more general" than "smoking and health," and that the claims posed no threat to national uniformity in the content of packaging, advertising, and promotional materials. *Id.* at 528-29. Three other justices considered these same materials in concluding that § 5(b) preempted none of the common law claims. *Id.* at 539-40 (concurring).

In *Medtronic*, a majority of the Court confirmed that determining the scope of express preemption turns ordinarily on the statutory framework, purposes, and history. Even with an express preemption provision, the Court "must nonetheless 'identify the domain expressly pre-empted' by th[e] language." 518 U.S. at 484. The goal in every case is to determine the actual purpose of Congress, which is "the ultimate touchstone," consistent with the "presumption[]" against preemption of "'the historic police powers of the States.'" *Id.* at 484-85. And that intent is to be discerned from the statutory "text," the "'statutory framework,'" and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law." *Id.* at 486. Thus, in construing the preemptive scope of § 5(b), the Court should consider the constructive aids that petitioners would prefer go unexamined.

C. *Cippolone* Concluded That Congress Intended § 5(b) To Preserve, Not Preempt, The States' Exercise Of Their Traditional Police Powers.

This Court has already determined that the term "based on smoking and health" does not have the broad, expansive meaning petitioners and their *amici* implicitly impute to it. To the contrary, the statutory framework, purposes, and

legislative history establish that "Congress intended the phrase 'relating to smoking and health' . . . to be construed narrowly, so as not to proscribe the regulation of deceptive advertising," even though, at a certain "level of generality," a false advertising claim could be regarded as being based on "'smoking and health.'" *Cipollone*, 505 U.S. at 529 & n.27 (plurality); *id.* at 539-40 (concurring).

The legislative history of the 1969 Act was instrumental in this analysis, because in it Congress "plainly expresse[d] an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27. After emphasizing its "narrow" preemptive scope, the Senate Report states that § 5(b) "'would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations.*'" *Id.* at 529 n.26 (omission in original) (quoting S. Rep. No. 91-566, at 12 (1969)).

Nothing in the text of the Act suggests any contrary intent. The "purpose" of the Act is "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . . ." 15 U.S.C. § 1331. That purpose is to be accomplished by "adequately inform[ing the public] about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes," while protecting commerce from being "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." *Id.*

The Act's structure, purpose, and history thus leave no doubt that Congress intended to preempt only those "requirements and prohibitions" affecting the content of tobacco advertising and labeling. Congress did not intend the Act to address the problem of minors who, under federal and State law, lack the capacity to make an informed decision to buy cigarettes under *any* labeling scheme. Thus, read "fairly

but narrowly," the Act evinces no Congressional intent to preempt States from using their police powers to adopt restrictions that regulate the placement, but not the content, of tobacco advertising in order to reduce demand for tobacco sales to minors that the States have directly prohibited.

D. The Massachusetts Regulations Are Traditional Police Power Measures Regulating The Location Of Outdoor Advertisements And Supporting Its Longstanding Ban On Cigarette Sales To Minors.

The Massachusetts regulations challenged here are even more clearly outside the domain preempted by § 5(b) than were the State law claims that survived preemption in *Cipollone*. Like those fraud claims, the regulations here rest on traditional police powers that long predate contemporary concerns about smoking and health. For example, they reflect one of the most general forms of the police power—the power to zone. It is well-established that "zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of states and municipalities." *Federation of Adver. Industry Representatives, Inc.* v. *City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) (citing *St. Louis Poster Adver. Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919)), *cert. denied*, 529 U.S. 1066 (2000). The power to "ban[] the outdoor advertisement of cigarettes is within that power." *Id.* (citing *Packer Corp.* v. *Utah*, 285 U.S. 105, 108-10 (1932)). Because the regulations here further a traditional police power of the states, the "'clear and manifest'" Congressional purpose required to preempt is absent. *Cipollone*, 505 U.S. at 516.

The regulations also further the traditional police power of protecting the welfare and moral development of minors. California first banned cigarette sales to minors in 1891, more than a half-century before the medical discoveries that support current health concerns about cigarettes. Cal. Penal Code § 308. The original California statute, which prohibited selling to anyone "under the age of sixteen years, any

tobacco, or preparation of tobacco" (1891 Cal. Stat. ch. 70, § 1, at 64), was codified as part of a chapter of the Penal Code containing offenses "Against Good Morals" Cal. Penal Code, pt. 1, tit. 9, ch 7, that bars selling alcohol to minors, or permitting minors to attend cockfights or to enter brothels. *Id.* §§ 307, 309 and 310. The moral obligation not to exploit the immaturity and vulnerability of minors, like the "duty to not to deceive," predates and "is more general" than the issue of "smoking and health." *Cipollone*, 505 U.S. at 528-29.

Massachusetts likewise has a long-standing law "which prohibits the sale of tobacco products to minors." *Consolidated Cigar Corp.* v. *Reilly*, 218 F.3d 30, 43-44 (1st Cir. 2000); see Mass. Gen. Laws Ann. ch 270, § 6 (West 2000). Ensuring compliance with the law barring tobacco sales to minors and concern for health were the two justifications upon which the Massachusetts Attorney General relied in promulgating the regulations. Mass. Regs. Code tit. 940, §§ 21.01, 22.01. In enacting its similar ordinance, the City of Los Angeles found that "tobacco [is] not a legal product for consumption by minors and therefore should not be advertised . . . where children frequent . . . ." See note 7 *supra*.

State laws designed to prevent sales to minors are consonant with Congressional intent not to "'affect the [traditional police] power of any State . . . with respect to . . . the sale of cigarettes to minors.'" *Cipollone*, 505 U.S. at 529 n.26. Thus, the California Supreme Court ruled that the Act does not preempt an action to enjoin as unfair cigarette advertising directed to minors. *Mangini* v. *R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 80 (Cal. 1994). Relying on the same passage of the 1969 Senate Report quoted in *Cipollone*, it reasoned that "[i]f Congress did not intend to affect the power of the state 'with respect to' the sale of cigarettes to minors, surely [§5 (b)] does not preempt attempts to prohibit the advertising of cigarettes directed at minors." *Id.* at 81.

Medtronic faithfully applies this Court's "clear and manifest" intent standard. Congress has given no indication that it intends to preempt the States when they legislate in furtherance of both their traditional police powers and a concern for health. To the contrary, the legislative history indicates that Congress intended to preserve the States' ability to enforce their police power to ban underage smoking. Thus, even assuming that a local statute rests on a health concern as well as on a police power concern for the morality and welfare of minors, that statute is still not preempted.

Finally, the Massachusetts regulations do not threaten the Congressional goal of ensuring national uniformity in the content of tobacco labeling, advertising, and promotional materials. Unlike the fraud claims in *Cipollone*, upheld even though they did regulate the health-related content of cigarette advertising and promotion, the regulations here are far less restrictive; they impose no content-related obligations, health-related or otherwise, on such advertising. Rather, they regulate the location of the advertising. Although there are variations in such location regulations, local zoning ordinances also vary in myriad other ways applicable to all advertisements. Variation in local zoning ordinances is a longstanding feature of American law with which tobacco companies, no less than other advertisers, have long had to contend, and Congress nowhere exempted them from compliance with this venerable local police power.

Massachusetts thus may permissibly regulate the location of billboards and signs that, when read by minors, propose the commission of an act made illegal by the State under its police powers. Its regulations further two traditional police powers—zoning and concern for the morality and welfare of minors—that Congress intentionally exempted from the preemptive scope of § 5(b), and that pose no threat to the purposes of the Act.

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT.

The regulations adopted in Massachusetts, like the Los Angeles Ordinance and other comparable laws, have been carefully designed to help enforce the ban on sales of tobacco to minors while leaving open ample alternative means of advertising tobacco products to adults. These restrictions therefore lack the features ("complete ban," "offensive paternalism") that have prompted calls for strict scrutiny of commercial speech restrictions, and fully satisfy the lesser scrutiny that should be applied here.

A. The Regulations Should Not Be Subject To Strict Scrutiny.

Relying on dicta in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), petitioners argue that commercial advertising is entitled to full constitutional protection unless it is false or misleading. Seeking strict scrutiny review, they claim Massachusetts' law is a blanket ban on truthful, non-misleading commercial speech that does not serve the only permissible basis for regulating such speech—protecting the "fairness and integrity of commercial transactions." Pet. Br. 28. This argument misconceives the justification for affording commercial speech constitutional protection. Even if the premise underlying petitioners' argument were not mistaken, moreover, that argument still fails on its own terms.

1. The Regulations Do Not Impair The Societal Interests That Justify Constitutional Protection Of Commercial Speech.

The reason advertising enjoys constitutional protection is to protect consumers' interest in the "'free flow of . . . information.'" *First Nat. Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764

(1976)),[24] not the self-expression of vendors.[25] Indeed, it is concern for the free flow of information that underlies the Court's hostility to regulations that are based on the "paternalistic" belief that people will "respond 'irrationally' to the truth." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 498, 504 (1996) (plurality) (quoting *Linmark Assocs.* v. *Township of Willingboro*, 431 U.S. 85, 96 (1977)). States can ban false or misleading advertising because it does not serve the societal interests that justify constitutional protection of commercial speech. This is not, however, the *only* commercial speech that can be restricted.

Truthful, nonmisleading commercial speech can be banned when it promotes an unlawful sale. See *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 183 (1999).[26] Such speech also can be restricted when it targets a vulnerable audience. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court upheld a ban on speech that was also

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[24] *See Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (constitutional protection of commercial speech "is based on the informational function of advertising"); *see also Edenfield* v. *Fane*, 507 U.S. 761, 766 (1993) (constitutional protection of commercial speech "safeguard[s]" the "societal interests in broad access to complete and accurate commercial information"); *Bates* v. *State Bar*, 433 U.S. 350, 364 (1977) (commercial speech protection serves society's interest in "informed and reliable decisionmaking"); *cf. Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[25] The First Amendment's concern for speakers does not extend to advertisers because their "hardy" speech is not "'susceptible to being crushed by overbroad regulation,'" *Central Hudson*, 447 U.S. at 564 n.6 (quoting *Bates*, 433 U.S. at 381), and is not "necessary to ensure that a democratic state remains responsive to the views of its citizens" or otherwise "valuable [to] democratic self-determination." R. Post, *The Constitutional Protection of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (2000).

[26] *Amici* endorse the extended development of this argument in the separate *amicus* brief filed in this case by the City of Oakland, California.

conceded to have been truthful and that did not mislead those who heard it. See *id.* at 468 (noting absence of "proof or findings of harm or injury"). The State could restrict this truthful, nonmisleading commercial speech, the Court concluded, because society's interest in the free flow of information does not apply when the speech is directed at a vulnerable segment of society that is "especially incapable of making informed judgments or of assessing and protecting their own interests." *Id.* at 467.[27] That is the situation here.

Massachusetts, like every other State, has concluded that minors are too immature to decide whether to smoke and has therefore prohibited the sale of tobacco to minors.[28] A wealth of evidence demonstrates, moreover, that the image-laden appeals of tobacco advertising entice minors to try tobacco by distorting their assessment of the risk. This advertising "leads youths to overestimate the prevalence of smoking and to consider smoking as normative," and youths who form these views are more likely to smoke than others. *1994 Surgeon General Report* at 192-94.[29] Outdoor and point-of-sale signs like those targeted here are particularly likely to convey the message that smoking is prevalent, because they "have more permanence than magazine ads, allowing multiple incidental exposures for all ages of persons who are on the

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[27] This Court has upheld other restrictions on truthful, nonmisleading commercial speech. In *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), the Court sustained a ban on speech that posed no threat to the "fair bargaining process," but instead caused "outrage and irritation" detrimental to the legal profession's reputation. *See id.* at 631.

[28] *See* Garner & Whitney, *Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479, 498 & n.103 (1997).

[29] *See also supra* at 3 (citing evidence linking advertising to underage smoking). This Court has relied on comparable evidence in First Amendment cases. *See Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 744-45 (1996) (plurality) (evidence concerning viewing habits of children).

neighborhood streets regularly, going to work, stores, or schools." *Id.* at 183; see *supra* at 5-6.

Thus, however truthful and nonmisleading petitioners' advertising may be to adults, society has no interest in ensuring that this information flows freely to minors who may not lawfully purchase the product and who lack the sophistication to assess the value of the speech. See *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) ("the law has generally regarded minors as having a lesser capability for making important decisions"); *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (States may conclude that, in some areas, "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees" (footnote omitted)). Petitioners' truthful commercial speech "more often than not will be injurious to" this audience, which society has long recognized is "especially incapable of making informed judgments or of assessing and protecting their own interests." *Ohralik*, 436 U.S. at 466, 467. A regulation that restricts the flow of otherwise truthful commercial speech to an audience that is especially vulnerable and to whom the product may not lawfully be sold should not be subjected to strict scrutiny review, because such a law does not undermine the societal interest in the free flow of commercial information that justifies constitutional protection of commercial speech in the first place.

2. The Concerns That Prompted Calls For Stricter Review Of Commercial Speech Restrictions Are Absent Here.

Even if all truthful, nonmisleading speech were entitled to "full" First Amendment protection, petitioners' claim for strict scrutiny of these commercial speech restrictions would still fail. To address the profound problem of underage smoking, States and Localities have *not* employed blanket bans on speech. They also have not manipulated the choices of legal users of a product for reasons unrelated to preserving

a fair bargaining process. Rather, they have enacted limited speech restrictions as adjuncts to a sales prohibition. They thus have targeted commercial speech that is unavoidable for those (minors) who may not lawfully purchase the products at issue and cannot fairly assess the value of the advertisers' speech. No member of the Court has called for strict scrutiny of such a responsible exercise of State and Local police powers, and such review would be wholly inappropriate.

While petitioners invoke the specter of "'blanket ban[s]'" and "wholesale suppression[s]," Pet. Br. at 33, 38, the regulations do not constitute a blanket ban, and thus do not give rise to the "special dangers" that the plurality in *44 Liquormart* suggested would warrant strict scrutiny. 517 U.S. at 502.[30] The regulations leave open numerous alternative means of advertising tobacco to adults. Indeed, petitioners' billboard and outdoor advertising accounted for a mere 5.7% of the industry's more than $5 billion in 1996 advertising and promotional expenditures. See *supra* at 8. These regulations pose no danger of driving petitioners' particularly "hardy" speech from the market.[31]

Nor do the regulations "obscure an 'underlying governmental policy,'" and thereby "impede debate over central issues of public policy." 517 U.S. at 503 (plurality) (quoting *Central Hudson*, 447 U.S. at 566 n.9). Like almost every other State, Massachusetts has openly barred the sale of

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[30] *See* 517 U.S. at 500 (plurality) ("special concerns arise from regulations that *entirely suppress* commercial speech) (internal quotation marks omitted); *id.* ("'special care' should attend the review of . . . *blanket bans*"); *id.* at 502 (plurality) ("special dangers . . . attend *complete bans* on truthful, nonmisleading commercial speech") (all emphases added).

[31] Petitioners refer to an "unfolding regulatory regime" and "unchecked suppression," Pet. Br. at 34, but their speculation about possible future regulations provide no basis for treating partial prohibitions as total bans.

tobacco products to minors, and it openly discourages underage use.[32]

Similarly, the regulations are not an exercise in "offensive" paternalism. Minors who frequent parks, playgrounds, schools, and establishments around such areas cannot fairly "'assess the value of the information presented'" in tobacco advertising. See *id.* at 504 (plurality). The protection of children is a virtue and, indeed, an obligation of the State. This protection does not cut off adults from access to tobacco advertising through other means and in other areas.

Finally, petitioners' extended reliance on *R.A.V.* is misplaced. The State has selectively restricted tobacco advertising on a basis directly related to "the characteristics of commercial speech" that, even on petitioners' narrow view, permit the States to regulate such speech. *R.A.V.*, 505 U.S. at 388-89; see Pet. Br. 29-30, 34. This is not a case where, for example, the State has barred truthful advertising of a product that may lawfully be sold to minors (*e.g.*, Barbie dolls) because of a concern unrelated to the "characteristics of commercial speech" (*e.g.*, a concern that such toys are

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[32] Contrary to petitioners' claim, the State's anti-smoking policy does not convert its regulations into impermissible viewpoint discrimination any more than an anti-drug policy would taint a ban on advertising of illegal drugs. Image-laden advertisements that favorably portray tobacco are not "advocacy materials.'" Pet. Br. at 39 (quoting *Meese* v. *Keene*, 481 U.S. 465, 480 (1987)). As this Court has made clear, even "advertising which 'links a product to . . . public debate,' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985). Because petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues[,] . . . [t]here is no reason for providing similar constitutional protection[s]" to their advertising. *Central Hudson*, 447 U.S. at 563 n.5. The opportunities for public comment, as well as alternative means for advertising to adults, belie petitioners' hyperbolic claim that their viewpoint will be lost to the marketplace and that "'official suppression of ideas is afoot.'" Pet. Br. at 39-40 (quoting *R.A.V.*, 505 U.S. at 390).

"demeaning"). *R.A.V.*, 505 U.S. at 388-89. Rather, these restrictions are "'linked inextricably' to . . . transactions" that the State not only has "the power to regulate" but *has* banned, *44 Liquormart*, 517 U.S. at 499 (plurality), and the restrictions relate directly to the State's concern that even truthful advertising can mislead immature minors. Cf. *Sandoz Pharms. Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 229-30 (3d Cir. 1990) (whether an advertisement is misleading under Lanham Act depends on the sophistication of the audience). Thus, the regulations here directly further the State's regulation of tobacco transactions and are designed to ensure that minors *can* participate in a "fair bargaining process" (cf. *44 Liquormart*, 517 U.S. at 501 (plurality); Pet. Br. 35) concerning the purchase or use of this product.

Banning unavoidable tobacco advertising in those areas most frequented by children is an exercise of the police power at its zenith. It is supported by the States' compelling interest in "protecting the physical and psychological well-being of minors," *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989), and by the States' substantial interests in protecting both captive audiences, see, *e.g.*, *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949), and "vulnerable" consumers, *Ohralik*, 436 U.S. at 465. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-51 (1978), this Court found that the confluence of these interests justified a prohibition on a type of speech entitled to even greater protection than advertising, and that was broadcast over a medium less invasive than billboards. See *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932) ("young people as well as . . . adults have the message of the billboard thrust upon them . . . . The radio can be turned off, but not so the billboard").[33]

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[33] *Carey* is not to the contrary. *See* Pet. Br. at 36-37. That case involved a complete ban on advertising of a product that the State could not prohibit minors from purchasing. 431 U.S. 694, 700-01. The State sought to justify its total ban on the ground that the advertising offended

Strict scrutiny review is thus plainly unjustified, and would impermissibly invite judicial assessment of policy judgments that courts are singularly ill-suited to second-guess. Indeed, petitioners' arguments illustrate this danger. They contend that Massachusetts' regulation is invalid because it does not restrict advertising of alcohol, a product that also cannot be sold to minors. Pet. Br. 38. But other governments (including Los Angeles) have addressed alcohol advertising, and in any case the questions of whether, when, and how to combat the problems of underage smoking as distinct from underage drinking are subjects for legislative, not judicial, determination. This Court should reject petitioners' invitation to second-guess these legislative judgments.

B. The Regulations Satisfy *Central Hudson*.

Petitioners alternatively argue that the regulations are unconstitutional even under the lesser degree of scrutiny applied in *Central Hudson*. This argument, too, is untenable.

1. The Regulations Directly Advance The State's Interests.

Petitioners claim the regulations do not directly advance the State's interests because the State lacked any "longitudinal stud[ies]," Pet. Br. at 42, or other exacting evidentiary proof (1) of a causal link between advertising and underage smoking, or (2) that the regulations will significantly reduce such smoking beyond any reduction attributable to the advertising restrictions in the MSA. These arguments profoundly overstate the State's burden of proof.

First, States may justify restrictions on commercial speech with "studies and anecdotes pertaining to other locales," or even "solely on history, consensus, and 'simple common sense.'" *Went for It, Inc.*, 515 U.S. at 628. It is

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moral sensibilities. *Id.* at 701. Here, there is only a partial restriction that is not designed to protect moral sensibilities but rather to suppress demand for sales that the State can and has barred.

commonsense that "[t]here is an immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569.[34] Certainly, petitioners "would not contest the advertising [restrictions] unless [they] believed that promotion would increase [their] sales." *Id.*

Second, the State relied on far more than commonsense. Although petitioners denigrate the *1994 Surgeon General Report* for failing to prove that advertising causes underage smoking, the report found that pervasive advertising "leads youths to overestimate the prevalence of smoking and to consider smoking as normative," and that those who overestimate its prevalence are more likely to smoke. *Id.* at 192-94. The City of Los Angeles relied on numerous other studies that confirm these conclusions. See *supra* at 3-4.[35] Such evidence, together with commonsense, is more than adequate to support the State's regulations. Contrary to the claims of petitioners' supporting *amici*, the unsurprising fact that there are conflicting studies on the complex social phenomenon of underage smoking does not prevent States from acting unless and until they prove to a judge or jury that advertising causes this harmful behavior. See Br. of Newspaper Ass'n of America et al., at 19-23. Where there is conflicting evidence, courts are not to "'reweigh the evidence *de novo*'" and determine whether, "as an objective matter," a legislative body's judgment is "correct." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 211 (1997). Rather, as long as a

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[34] *See also Anheuser Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996); *Dunigan* v. *City of Oxford*, 718 F.2d 738, 749 (5th Cir. 1983); *Williams* v. *Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980); *see also Greater New Orleans Broad. Ass'n*, 527 U.S. at 189 ("it is no doubt fair to assume that more advertising *would* have some impact on overall demand" (emphasis added)).

[35] Petitioners' "brand loyalty" argument, Pet. Br. at 42 n.8, is thus irrelevant. Advertising that induces minors to *begin* smoking is not harmless because its affect on those already addicted may merely be to shift brand loyalties.

legislative conclusion is "reasonable and supported by substantial evidence" it must be upheld, "regardless of whether the evidence is in conflict." *Id.*; see also *Dunigan*, 718 F.2d at 748 n.8 ("whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question").

Petitioners' claim that the State must demonstrate a significant marginal reduction in underage tobacco use beyond that attributable to the MSA is similarly flawed. A State law's constitutionality cannot depend on the fortuity of whether it was enacted prior to a settlement (as was Los Angeles's ordinance), or whether the evidence is tailored to the precise contours of such a settlement. Relying on commonsense assessments, the Court has required actual evidence that a restriction materially advances a State's interest only where the benefit is not intuitively obvious. Compare *Went for It, Inc.*, 515 U.S. at 626-29 (requiring no proof that a solicitations ban would result in a measurable improvement in lawyers' image), with *44 Liquormart*, 517 U.S. at 505-07 (plurality) (requiring evidence that inflated prices would reduce alcohol consumption), and *Bolger* v. *Younger Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) ("reasonably assuming" that ban on mailing contraceptive advertising would marginally aid parents in shielding their children because parents already control access to mail in the home and can stop the delivery of offensive items).[36] Here, the benefits are obvious. The MSA is incomplete. It neither binds every tobacco company nor provides protection against all advertising that entices minors to purchase cigarettes; and States and Localities need the flexibility to supplement it to address local needs and conditions. Eliminating tobacco ads up to 14 square feet in size from indoor and outdoor areas

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[36] *Edenfield* is not to the contrary. There, the Court required evidence that the counter-intuitive harm the State sought to prevent—that in-person solicitations by accountants would mislead sophisticated business executives—actually existed. *See* 507 U.S. at 771-73.

frequented by children likely will materially reduce underage smoking. The Constitution requires nothing more.

2. The Regulations Are Proportional To The State's Legitimate Interests.

Finally, the regulations satisfy *Central Hudson*'s requirement of a "reasonable" fit "between the legislature's ends and the means chosen to accomplish those ends"; they are "narrowly tailored" and proportional to the interest served. *Went for It, Inc.*, 515 U.S. at 632 (quotation marks omitted). Petitioners' claim that the restrictions constitute "blanket bans" that leave no "alternative channels . . . readily available," Pet. Br. 45-46 (internal quotation marks omitted), is demonstrably untrue. See *supra* at 8. Because there are "many other ways for [adults] to learn about the availability of" petitioners' products, *Went for It, Inc.*, 515 U.S. at 633, adults will not be reduced "'to reading only what is fit for children,'" Pet. Br. at 47 (quoting *Bolger*, 463 U.S. at 74).[37] The availability of other means of advertising distinguishes this case from the total bans in petitioners' cited cases.[38]

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[37] *Amici* National Advertisers are thus wrong in arguing that other modes of communication "cannot save" the regulations. ANA Br. at 18 n.9. The case they cite, *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85 (1977), states only that alternative modes are inadequate if they provide no realistic opportunity for communicating. *Id.* at 93. Nor has this Court ever invalidated a ban that left open other means of communication because one of many affected vendors may have greater difficulty advertising one of the many products it offers for sale. *See* Br. of The National Association of Convenience Stores at 5-11.

[38] *See Virginia State Bd of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976) (law prohibited "'advertis[ing] or promot[ing], directly or indirectly, in any manner whatsoever'" prescription drug prices); *Central Hudson*, 447 U.S. at 570 (ban "reaches all promotional advertising"); *44 Liquormart*, 517 U.S. at 489 (law banned "'advertising in any manner whatsoever' the price of any alcoholic beverage"); *Carey*, 431 U.S. at 681 (law made it a crime "for any person . . . to advertise or display contraceptives"); *Bolger*, 463 U.S. at 61 (law banned mailing of "'[a]ny unsolicited advertisement'" concerning

Accordingly, petitioners err in contending that States should have adopted a host of alternative measures instead of the challenged regulations. States have already used "direct regulation" and "educational campaigns," *44 Liquormart*, 517 U.S. at 507 (plurality), and the federal government has required "warnings[] and disclaimers." *Id.* at 498. Having found these measures insufficient, States need not exhaust all other avenues before restricting invasive forms of advertising in areas frequented by children. Indeed, while petitioners and their *amici* dismiss the scientific evidence that supports these regulations, they cite no evidence to prove the efficacy of the expensive licensing and enforcement measures they advocate.

Petitioners' contention that the State should have employed a 500-foot, instead of a 1000-foot, zone is similarly misguided. After detailed study, Los Angeles found that most tobacco advertising is concentrated in such areas, and that a 500-foot restriction would be ineffective. See *supra* at 6. In light of such findings and the numerous alternative channels the regulations leave open, the additional protection afforded minors by a 1000-foot zone is constitutionally permissible. Nor does the fact that children *in* parks, playgrounds, and schoolyards cannot see *some* prohibited signs that are 1000 feet away, Pet. Br. at 47, provide a basis for second-guessing the State's choice. Just as it was reasonable for the State to conclude that children are most frequently in parks and schools, it was reasonable to conclude that they typically travel the streets and frequent stores within 1000 feet of these venues, and thus will see invasive advertising *on their way to* parks and schools.

Finally, the numerous alternative channels open to petitioners, as well as the invasiveness of their outdoor advertising, distinguish the State's restrictions from those at

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contraceptives (alteration in original)); *Sable*, 492 U.S. at 118 (law "impose[d] an outright ban on indecent as well as obscene" interstate telephone calls); *Butler* v. *Michigan*, 352 U.S. 380, 381 (1957) (blanket prohibition of "'obscene, immoral, lewd, or lascivious'" materials).

issue in the indecency cases petitioners cite. In striking down blanket bans on dial-a-porn, unsolicited mailings for contraceptives, and criminal prohibitions on internet transmissions of obscene or indecent messages to minors, the Court emphasized that the communications were not as invasive as radio or television broadcasts, that parents had ample means of shielding their children from offensive material, and that a desire to protect the most "determined child" could not justify a total prohibition.[39] Petitioners' advertising, in stark contrast, is *more* invasive and unavoidable than radio and television broadcasts; it is uniquely and repeatedly accessible to *all* children, not merely the most determined; and parents have *no* ability to shield their children from these messages as their children travel to and from parks and schools.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

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[39] *See Sable* 492 U.S. at 127-30 (unlike "public displays . . . which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication," and use of access codes could keep such messages from children); *Reno* v. *ACLU*, 521 U.S. 844, 869 (1997) ("the Internet is not as 'invasive' as radio or television," sexually explicit materials do not "appear on one's . . . screen unbidden," and are preceded by warnings); *Bolger*, 463 U.S. at 74 (while broadcasting "is 'uniquely accessible to children, even those too young to read[,]' [t]he receipt of mail is far less intrusive and uncontrollable" (emphasis omitted)).

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